



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 29 OF 2019**

**JACQUELINE MACH DAMON.....1<sup>ST</sup> PLAINTIFF**

**MAWE MBILI LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE RIGHT HONOURABLE HUGH GEORGE**

**CHOLMONDELEY FIFTH BARON.....1<sup>ST</sup> DEFENDANT**

**JONATHAN SEWART.....2<sup>ND</sup> DEFENDANT**

**PHILIP COULSON.....3<sup>RD</sup> DEFENDANT**

**NICHOLAS CUMMINGS .....4<sup>TH</sup> DEFENDANT**

**MICHEAL DAVID STANFORD TUCK.....5<sup>TH</sup> DEFENDANT**

**DELAMERE ESTATES LIMITED .....6<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The Court on 24<sup>th</sup> September 2019 following a Notice to withdraw the suit filed by the 2<sup>nd</sup> plaintiff marked the 2<sup>nd</sup> plaintiff's suit against the defendants withdrawn. An application dated 23<sup>rd</sup> October 2019 that sought review of the court order dated 24<sup>th</sup> September 2019 was dismissed by the court on 1<sup>st</sup> October 2020. The 1<sup>st</sup> plaintiff, Jacqueline Mach Damon, vide a Notice of Motion dated 9<sup>th</sup> October 2020 filed on 13<sup>th</sup> October 2020 inter alia sought to be granted leave to continue the claim as a derivative claim on behalf and for the benefit of the 2<sup>nd</sup> plaintiff who she sought leave to amend the plaint to include as the 7<sup>th</sup> defendant. Before this application was heard the 1<sup>st</sup> plaintiff filed the Notice of Motion dated 19<sup>th</sup> July 2021 which is the subject of this ruling.

2. The Notice of Motion dated 19<sup>th</sup> July 2021 was expressed to be brought under Order 51 Rule 1, Order 8 Rule 3(1), 5 and 7, Order 45 Rule 2 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act. The 1<sup>st</sup> plaintiff /Applicant prays for the following orders:-

*1. Spent.*

*2. That the application dated 9<sup>th</sup> October 2020 be withdrawn and replaced with the instant application.*

*3. That this Honorable court be pleased to review its orders of 1<sup>st</sup> October 2020.*

*4. That the honorable Court be pleased to grant leave to the plaintiff/applicant to continue this claim as a derivative claim on her behalf and for the benefit of the 2<sup>nd</sup> plaintiff.*

*5. That pending the hearing and determination of this application, the Defendants/ Respondents whether by themselves, agents, servants or otherwise howsoever be restrained from eviction, interrupting and/or interfering with the plaintiff's quiet possession of that property known as Land Reference Number 9362/4.*

6. That pending the hearing and determination of this suit or further Orders, the Defendants/respondents whether by themselves, agents, servants or otherwise howsoever be restrained from evicting, interrupting and/or interfering with plaintiff's quiet possession of that property known as Land Reference Number 9362/4.

7. That the plaintiff/applicant be granted leave to amend the plaint dated 27<sup>th</sup> February 2020 and to file additional statements and documents.

8. That the annexed amended plaint annexed hereto be deemed duly filed and served.

9. That the 2<sup>nd</sup> plaintiff be deemed a proper and necessary party in the suit.

3. The application was supported on the grounds set out on the face of the application and the affidavit sworn in support by Jacqueline Mack Damon. It is the applicant's case that she and her husband (Mr. Damon) from who she is now divorced have been the Co-directors and shareholders of Mawe Mbili Company Ltd and that she had solely been managing the company. That owing to their strained relationships the applicant avers her co-director has refused to co-operate in matters relating to the company and that he instead has sought to frustrate her efforts to salvage the company following a fire that burnt down "Sleeping Warrior Lodge" that was operated by the company leading to the loss of company property and her own personal property.

4. The applicant avers that at the time of filing the suit, she and her former husband were not on talking terms and they could therefore not hold any meeting that could generate any requisite resolutions and as the notice served on the company to vacate the premises was expiring she had to file the suit on her own behalf and on behalf of the company. She averred that her former husband and Co-director and shareholder colluded with the defendants to withdraw Mawe Mbili Limited as the 2<sup>nd</sup> plaintiff to frustrate her cause. The applicant thus seeks to be allowed to proceed with the suit on behalf of Mawe Mbili Limited by way of a derivative action.

5. Jean Francois Lonis Damon the Co-director/shareholder of the 2<sup>nd</sup> plaintiff swore a replying affidavit dated 26<sup>th</sup> September 2021 to the applicant's application. He averred that the applicant's claims particularly that she single handedly financed the 2<sup>nd</sup> plaintiff were unsubstantiated but admitted that "Sleeping Warrior Lodge" was gutted by fire that destroyed all but two cottages with the result that the 2<sup>nd</sup> plaintiff's business faced financial difficulties. He deponed that 2<sup>nd</sup> plaintiff was a separate and independent legal entity from its shareholders/directors. He averred that after the 2<sup>nd</sup> plaintiff was served with a Notice of Termination of Lease for breach and efforts to get the defendants to suspend the notice in view of destruction of the Lodge by fire were unsuccessful, the 1<sup>st</sup> plaintiff instituted the present suit without authorization of the 2<sup>nd</sup> plaintiff on the 27<sup>th</sup> February 2019 on the eve of the expiry date of the Notice on 28<sup>th</sup> February 2019.

6. The deponent further averred that the 1<sup>st</sup> plaintiff during the period she managed the 2<sup>nd</sup> plaintiff's operations during his absence owing to health reasons from 2014, mismanaged the 2<sup>nd</sup> plaintiff after she unilaterally appointed herself as the managing director thereby sidelining the management team that had been running the affairs of the 2<sup>nd</sup> plaintiff. He further averred the profits of the 2<sup>nd</sup> plaintiff dwindled during the watch of the 1<sup>st</sup> plaintiff and that the 1<sup>st</sup> plaintiff neglected to cause insurance against fire to be taken whilst she was aware bushfires could occur and further failed to take precautions against spread of fire in the event of occurrence. The deponent further averred the withdrawal of the suit was taken in the best interest of the 2<sup>nd</sup> plaintiff after due deliberation and considerations of the board at a duly convened meeting which the 1<sup>st</sup> plaintiff did not attend or send a proxy. The withdrawal of the suit could not hamper the 2<sup>nd</sup> plaintiff in negotiating a resolution of the dispute with the board of the 6<sup>th</sup> defendant and that the 2<sup>nd</sup> plaintiff as entitled in law to seek to withdrawal the suit by it if it was in its interest.

7. The deponent further averred that the court could not entertain an application to review its order a second time and contended that the 1<sup>st</sup> plaintiff in instituting unauthorized suits in the name of the 2<sup>nd</sup> plaintiff was in real sense pursuing personal vendetta and not the interest of the 2<sup>nd</sup> plaintiff. He urged the court to find the application to be an abuse of the court process and to dismiss the same with costs.

8. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Respondents filed grounds of opposition to the applicant's application and inter alia contended that the applicant's application dated 19<sup>th</sup> July 2021 was resjudicata and further that the application did not satisfy the threshold set out in the case of **Foss-vs- Herbottle (1843) 2 Hanes 461** respecting the institution of a derivate suit as sought by the applicant. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Respondents further took a preliminary objection on interalia the ground that the court lacked jurisdiction to hear and determine the applicant's application.

9. The court directed that the application dated 19<sup>th</sup> July 2021 and the Defendants/Respondents preliminary objection be canvassed by way of written submissions. The 1<sup>st</sup> applicant/plaintiff filed her submissions and supplementary submissions on 2<sup>nd</sup> November 2021 and 9<sup>th</sup> December 2021 respectively. The 2<sup>nd</sup> plaintiff applicant's submissions were filed on 4<sup>th</sup> November 2021. The 1<sup>st</sup> to 6<sup>th</sup> defendants/respondents filed their submissions on 27<sup>th</sup> January 2022. Having considered and reviewed the application, the affidavits in support and in opposition and objection; and the submissions by the parties the issues that stand out for determination are as follows:-

**(i) Whether the court has the jurisdiction to entertain the Applicant's application?**

**(ii) Whether the applicant is entitled to the orders sought in the application notably leave to proceed with the suit as derivative suit on behalf of the 2<sup>nd</sup> plaintiff.**

10. The 1<sup>st</sup> to the 6<sup>th</sup> defendants premised their preliminary objection on a point of law; namely that by virtue of Order 45 Rule 6 of the Civil Procedure Rules that this court lacked the jurisdiction to entertain the applicant's instant application which sought review of the court's order dated 1<sup>st</sup> October 2020 declining to grant the applicant's earlier application dated 23<sup>rd</sup> October 2019 seeking review of a court order dated

24<sup>th</sup> September 2019. Order 45 Rule 6 provides as follows:-

*“No application to review an order made on an application for review of a decree or order passed or made on a review shall be entertained”*

11. The preliminary objection was clearly on point of law and thus satisfied the threshold established in the case of **Mukisa Biscuit Manufacturing Ltd -vs- West End Distributors Ltd (1969) 1 EA 696** where the court of Appeal stated:-

*“--- a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. --- A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”*

12. In the application dated 23<sup>rd</sup> October 2019 the present applicant sought under prayer (1) to have the court review and vary its order of 24<sup>th</sup> September 2019 marking the suit by the 2<sup>nd</sup> plaintiff withdrawn. The court by its ruling dated 1<sup>st</sup> October 2020 declined to review the order meaning the suit by the 2<sup>nd</sup> plaintiff stood withdrawn.

13. In the present application the applicant under prayer (3) prays that the court reviews its order of 1<sup>st</sup> October 2020. The applicant thus is asking the court to review what it declined to review in the earlier application. The other prayers in the application are dependent on the order for review being granted. This is so, because without the order of 1<sup>st</sup> October 2020 being reviewed, the 2<sup>nd</sup> plaintiff whose suit was withdrawn cannot be and is not a party in the present suit. The 1<sup>st</sup> plaintiff in order to prosecute the suit as a derivative suit on her own behalf and on behalf of the 2<sup>nd</sup> plaintiff the 2<sup>nd</sup> plaintiff would need to be joined as a party. In the present suit, the withdrawal of the 2<sup>nd</sup> plaintiff as a party has been upheld by the court and as matters stand there is no suit now on record by the 2<sup>nd</sup> plaintiff and/or on behalf of the 2<sup>nd</sup> plaintiff.

14. In the case of **Bethwel Omondi Okal -vs- Managing Director KPLC (2019) eKLR** Limo, J commenting on the application of Order 45 Rule 6 in review applications stated as follows:-

*“ the procedure and the scope for moving the court is provided under Order 45 Rule 1 which I have cited above. However, under Rule 6 of Order 45 Civil Procedure Rules there is a clear bar of subsequent application for review once decision or a ruling is made on an application for review. Simply put, a court while exercising its jurisdiction for review cannot be asked to review a review order because the law does not allow it”.*

15. This court had pronounced itself on the application for review dated 23<sup>rd</sup> October 2019 vide its ruling of 1<sup>st</sup> October 2020. The present application dated 19<sup>th</sup> July 2021 seeks a review of the order the court made on 1<sup>st</sup> October 2020. The gist of the order of 1<sup>st</sup> October 2020 was to decline to reinstate the suit by the 2<sup>nd</sup> plaintiff withdrawn on 24<sup>th</sup> September 2019. The court in terms of Order 45 Rule 6 cannot be asked to review an order arising from an application for review. The court essentially is *functus officio* and ought not to deal with a matter that it has already dealt with and rendered a decision. In the case of a decision emanating from a review application any challenge against such a ruling/decision can only be by way of an appeal to a higher court. The supreme court of Kenya in the case of **Raila Odinga & 2 others -vs- IEBC & 3 others (2013) eKLR** in considering the *functus officio* doctrine reiterated the holding in the case of **Jersey Evening Post Ltd -vs- Al Thani (2002) JLR 542** at 550 where it was stated:-

*“ A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”*

16. The supreme court in the same case cited with approval an Article by Daniel Malan Pretorins, in:-

*“ The origins of the functus officio Doctrine, with Specific Reference to its application in Administrative Law” (2005) 122 SLJ 832:-*

*“ The funtus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to the doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter—The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker”.*

17. The 2<sup>nd</sup> plaintiff applicant in its submissions supported the position taken by the 1<sup>st</sup> to 6<sup>th</sup> defendants in regard to the preliminary objection.

18. The 1<sup>st</sup> plaintiff applicant in both her submissions and the supplementary submissions did not substantively deal with the preliminary objection that the court by virtue of Order 45 Rule 6 of the Civil Procedure Rules had no jurisdiction to deal with the application in so far as

it sought review of the order of the court of 1<sup>st</sup> October 2020 which resulted from an application for review. The 1<sup>st</sup> plaintiff's submissions were almost entirely devoted to whether or not the 1<sup>st</sup> plaintiff should be granted leave to continue with the suit by the 2<sup>nd</sup> plaintiff as a derivative claim.

19. As demonstrated herein above the 1<sup>st</sup> plaintiff could not properly file an application to review the decision/ruling of 1<sup>st</sup> October 2020 which was on an application for review by reason of Rule 6 of Order 45 of the Civil Procedure Rules. Upon the recording of the order of withdrawal of the suit by the 2<sup>nd</sup> plaintiff on 24<sup>th</sup> September 2019, the 2<sup>nd</sup> plaintiff ceased to be a party in the suit. The order of 1<sup>st</sup> October 2020 declining to review the order of the court of 24<sup>th</sup> September 2019 meant that the position remained that the 2<sup>nd</sup> plaintiff had withdrawn its suit against the defendants and accordingly it was not a party. No further application to effectively review the court order of 24<sup>th</sup> September 2019 through a review of the order of 1<sup>st</sup> October 2020 could be made before this court as Rule 6 of Order 45 Civil Procedure Rules bars it. There is in essence no suit by the 2<sup>nd</sup> plaintiff or on behalf of the 2<sup>nd</sup> plaintiff by the 1<sup>st</sup> plaintiff which the 1<sup>st</sup> plaintiff would be granted leave to proceed with as derivative action. It appears to me the 1<sup>st</sup> plaintiff would if minded to do so have to commence a fresh action and seek leave to be permitted to proceed with such as a derivative action, if she is able to satisfy the threshold for grant of such leave. The prayer for leave in the instant application has no basis in the absence of any suit by or on behalf of the 2<sup>nd</sup> plaintiff.

20. As regards the Notice of Motion dated 19<sup>th</sup> July 2021 I find that the court lacks the jurisdiction to entertain the same by reason of Order 45 Rule 6 of the Civil Procedure Rules. The application is incompetent and I order the same struck out. Given the nature and circumstances of this matter I order that each party bear their own costs of the application.

21. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF FEBRUARY 2022.**

**J M MUTUNGI**

**JUDGE**